



NO. 83-5530

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THOMAS N. SCHIRO,

Petitioner,

vs.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana, thereby refusing to review the decision entered by the Court in Cause No. 1181 S 329 on.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 451 N.E.2d 1047, and may be found in Petitioner's Appendix A.

STATEMENT OF THE CASE

On February 10, 1981, Petitioner was indicted in three counts for Knowing and Intentional Murder, Murder while committing and attempting to commit Rape, and Murder while committing and attempting to commit Criminal Deviate Conduct. On April 9, 1981, the State filed indictments claiming as aggravating circumstance justifying the death penalty that the Murder was committed knowingly and intentionally, and asking for the death penalty. The indictments charged that Schiro gained access to the home of an Evansville, Indiana woman and forcefully raped and sodomized her, beat and mutilated her, strangled her to death, and continued to mutilate and have sexual relations with the corpse. Schiro was tried and convicted of the murder.

Pursuant to Indiana procedure the jury then heard the issue of capital punishment, and ultimately issued its advisory

recommendation that the judge sentence defendant to a term of years, rather than death. Following consideration of a pre-sentence investigation report, the trial court, following an Indiana procedure upheld by the Indiana Supreme Court in appeal of this case, declined to follow the advisory recommendation of the jury, and sentenced Petitioner to death.

Following the denial of his Motion to Correct Errors in the trial court, Petitioner initiated an appeal, contending among other things that the trial court's written findings in support of its judgment were inadequate as a matter of State and Federal law. Before deciding any other issues, the Indiana Supreme Court remanded the matter to the trial court with orders to issue a nunc pro tunc entry restating its judgment in reviewable form, especially to specify the aggravating circumstance and mitigating circumstances concerning the offense and the offender upon which it relied in making its judgment.

The trial court complied with the said order, and following supplemental briefings on the new version of the trial court's judgments, the Indiana Supreme Court issued its opinion in this case upholding the conviction and the imposition of the death penalty. Following denial of the petition for rehearing in this case, Petitioner by counsel filed his petition for writ of certiorari in this Court on September 30, 1983, a copy of which petition was received by this office on October 3, 1983. Petitioner has moved for and received permission by this Court to proceed in forma pauperis.

#### STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The petition contends that in three respects the opinion of the Supreme Court of Indiana was contrary to the applicable decision of this court. In order discussed herein, (which conforms to their chronological order as set forth above) these issues are:

I. Whether Indiana's procedure permitting a trial court to issue a judgment of death despite a jury recommendation to the contrary is impermissible as Double Jeopardy.

II. Whether the issuance and order directing a nunc pro tunc entry of findings supporting the imposition of the death penalty was improper as Double Jeopardy.

III. Whether the Indiana Supreme Court's procedures and standards for reviewing the judgment of death in this case conform to requirements of this Court.

#### SUMMARY OF THE ARGUMENT

I. This Court has explicitly approved the State of Florida's practically identical procedure permitting the court to issue a verdict of death despite an advisory jury verdict to the contrary. Indiana's procedure differs only in the higher degree of proof it requires for finding of an aggravating circumstance, but carefully avoids making the jury recommendation necessarily a "beyond a reasonable doubt" determination of any factual issue, and clearly provides that in its sentencing procedure the only final determination is that issued by the trial court judge. Since there is only one such determination, a defendant is not exposed to double jeopardy.

II. The Indiana Supreme Court remanded to the trial court for issuance of a nunc pro tunc restatement of its judgment to comply with the requirement that aggravating and mitigating circumstances related to the facts of the crime and the character of the offender be stated therein. This procedure was not a Double Jeopardy violation because it did not ask for a redetermination or retrial of any issues. It merely followed the same procedure which this Court has used in remanding to a State court for reconsideration of circumstances relating to its decision on the death penalty.

III. The Indiana Supreme Court has announced its standards for review of death sentences. It has interpreted a



rule concerning appellate review of sentences to require, in capital cases, a standard of review which conforms to the standards developed by this court. Specifically, the Indiana Supreme Court has announced that its purpose and standard of review is to ensure against the influence of improper or prejudicial factors at trial level, to determine that elements of arbitrariness and capriciousness are not present in a death sentence, to make an informed and guided inquiry into the appropriateness of the capital punishment in a given case, and to consider from the point of view of its statewide jurisdiction over all murder appeals, to ensure consistent, fair, and even-handed operation of the statute. These standards, as announced and as applied in this case, do not contradict the opinions of this court.

#### REASONS FOR DENIAL OF THE WRIT

##### I.

#### IT IS NOT DOUBLE JEOPARDY FOR A TRIAL TO OVERRULE A JURY'S ADVISORY RECOMMENDATION OF MERCY

Petitioner's grounds for issuance of a writ include the premise that it is impermissible for Indiana to institute a capital punishment procedure wherein a jury's sentencing recommendation is advisory only and the trial court may sentence a defendant to death despite a jury recommendation for mercy.

Petitioner asserts that the Indiana Supreme Court's decision in this case allowing such a procedure decided a Federal question in a manner contrary to this court's decision in Bullington v. State, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270. In Bullington the jury, under Missouri law the final sentencing authority, had issued a final determination of mercy, which automatically became the judgment of the court. After the judgment was set aside on other grounds, the State of Missouri again sought the death penalty. This Court held that Missouri was foreclosed from doing so as a limited exception to the rule that double jeopardy does not prohibit a harsher sentence at

retrial, North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). In Missouri, all issues involved in a death penalty determination were subject to the standard of proof beyond a reasonable doubt, and any decision had to be reduced to a written finding. Thus, it was impossible for the sentencing issue to be decided one way or another without a finding of proof, or failure of proof, beyond a reasonable doubt, that an aggravating circumstance existed and that there was sufficient beyond a reasonable doubt, in light of mitigating circumstances, to justify execution.

Petitioner attempts to liken the jury part of Indiana's procedure to such a "full-blown trial" on the punishment issue and a jury recommendation of mercy to a "verdict of acquittal." In Indiana's procedure the jury's deliberation is just the first stage in a single fact-finding process whose ultimate determinations are made only by the judge. This Court said, in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) that death sentence determinations can more rationally and consistently be made by a judge who has sentencing and criminal law experience than by a jury which does not, and a jury may be properly used to provide community opinion to assist the judge in his final determination. Proffitt, 428 U.S. at 259, 96 S.Ct. at 2966.

This Court's goal of rational and consistent application of the death penalty is served by court sentencing with advice from a jury. The crucial distinction from Missouri's scheme is that in Indiana the judge's and the jury's deliberation are part of the same fact-finding and sentencing determination, while in Missouri the jury has sole discretion in such matters.

Where the jury's role is advisory, as in Florida, this court has affirmed death sentences pronounced despite jury recommendations of mercy. E.g., Barclay v. Florida, \_\_\_ U.S. \_\_\_, 103 S.Ct. 3418, \_\_\_ L.Ed.2d \_\_\_ (1983).

The only substantial distinction between the Indiana and Florida procedures is that Indiana requires any jury recommendation to be unanimous, whereas Florida permits a majority verdict and does not require any proof beyond a reasonable doubt. As a matter of State law, Indiana has, thus, provided a degree of protection for the defendant not required by this Court in Proffitt or Barclay by providing an initial "reasonable doubt" hurdle on the existence of an aggravating circumstance. But Indiana did not impose such a burden of proof on the issue of mitigating circumstances. It carefully refrained from establishing a system whereby a jury's recommendation of mercy is necessarily a finding of failure to prove beyond a reasonable doubt.

Thus it is clear that Indiana's system under which jury advisories of mercy might be contradicted by the trial court can be constitutionally operated. Our Court did not contradict Federal law in ruling that Indiana's establishment of such a system is not unconstitutional per se.

## II.

### PETITIONER WAS NOT PLACED IN DOUBLE JEOPARDY BY THE REMAND FOR FINDINGS

Petitioner claims a due process violation in the remanding of this case by the Indiana Supreme Court to the trial court judge for a nunc pro tunc re-entry of its findings. He characterizes this as a remand for "additional findings" (brief, p. 13), "complete re-evaluation" or a "redetermination of the evidence" (brief, p. 15).

Petitioner complains of double jeopardy and that the so called "redetermination" occurred without hearing or other opportunity of the Petitioner to be heard. Petitioner's position is based on a misconstruction of the nature and purpose of the Indiana Supreme Court's remand order.

Indiana in 1976 and 1977 eliminated all jury determination of sentencing (except for its advisory role in death penalty cases) and established a system of "presumptive" sentences for

each class of felony, to which a limited number of years could be added or subtracted by the judge for aggravating or mitigating circumstances.

The Indiana Supreme Court has adopted a requirement that the court must provide articulated reasons for any "nonpresumptive" sentencing, specifically citing a factual basis for the lengthened or shortened sentence based on the character of the offense and the offender. When trial courts fail to meet this requirement, the Indiana Supreme Court consistently applies the same remedy: The case is remanded with an order for the trial judge to reduce his findings to writing such as to allow review of the actual considerations for or against the sentence. Page v. State, (1981) \_\_\_ Ind. \_\_\_, 424 N.E.2d 1021; Green v. State, (1981) \_\_\_ Ind. \_\_\_, 429 N.E.2d 635. In such a case the Indiana Supreme Court demands no new decision of the trial court or any reweighing or reassessment by the trial court of the evidence. Such an order requires only that an entry state the reasons the court considered when the aggravated sentence was imposed. See Farina v. State, (1982) \_\_\_ Ind. \_\_\_, 442 N.E.2d 1104. The Court often issues its order before continuing its consideration of any issues on appeal. E.g., Wilburn v. State, (1982) \_\_\_ Ind. \_\_\_, 442 N.E.2d 1098 rev'd on other grounds. In Wilburn, the trial court complied with such an order by filing a nunc pro tunc entry as to those reasons. The Indiana Supreme Court accepted the nunc pro tunc entry as a satisfactory means to comply.

States must insure that the "process for imposing a sentence of death" be made "rationally reviewable". Godfrey v. State, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398. This Court requires States to establish a procedure by which "meaningful appellate review" of the death sentence can be undertaken. Gregg, Proffitt, supra; Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). State appellate courts thus have a high duty to ensure that judgments of death explain all the trial court's



considerations in a manner which is rationally reviewable in light of the state's statutes and national and state case law. It follows that the reviewing court may (indeed, must) ensure such reviewability, by remanding when necessary to the trial court with orders to provide reviewable findings. The Indiana Supreme Court did so in the first capital case to arise under our post - Gregg statute. Judy v. State, (1981) \_\_\_ Ind. \_\_\_, 416 N.E.2d 95, as well as in the instant case.

Subsequently to the complained-of remand order by the Indiana Supreme Court in this case, in Eddings v. Oklahoma, (1982) \_\_\_ U.S. 102 S.Ct. 869, \_\_\_ L.Ed.2d \_\_\_, this Court remanded a sentence to Oklahoma's state courts with instructions that they, "[o]n remand must consider all relevant mitigating evidence and weigh it against the evidence of aggravating circumstances." 102 S.Ct. at 887. This Court surely did not consider its instructions to reweigh the mitigating circumstances and create a reviewable record to violate of the prohibition against double jeopardy. It is an inescapable conclusion, then, that where a state Supreme Court likewise remands a capital case for a nunc pro tunc restatement of sentencing criteria, said remand is not improper.

All the cases cited by Petitioner to support his claims are distinguishable in crucial respects from this case. We have already mentioned the facts of Bullington v. Missouri, supra. In our case, by contrast, there was no issue of retrial or redetermination because the trial judge, not the jury, was the final sentencing authority, and he was not required to retry or redetermine the case, but only to provide a more complete statement of the reasoning he already had employed. Initially, he had found the existence of aggravating circumstances to "far outweigh" any mitigating circumstances. The Indiana Supreme Court only required the judge to explain by nunc pro tunc entry just what these aggravating and mitigating circumstances were.

In Eddings this Court actually called for a more sweeping redetermination than the Indian Supreme Court did in this case. The Indiana Supreme Court's more limited action to acquire a reviewable record (with no reweighing and no redetermination) must likewise constitute no double jeopardy.

Two other cases cited by Petitioner, Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Green v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 are inapplicable. They involve cases where convictions were reversed for insufficiency of the evidence. The judgment initially issued herein was incomplete due to inadequate stating of the factual considerations involved, not due to insufficiency of the evidence. The Indiana Supreme Court's remanding order was not a finding of insufficient evidence to support the judgment.

Finally, Petitioner cites Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1198, 541 L.Ed.2d 393 (1977) which holds that Due Process requirements must be satisfied in the sentencing process. He does not dispute that he was sentenced following a hearing at which it had to be proved to the fact-finder beyond a reasonable doubt that an aggravating circumstance existed and in which he was allowed to produce any evidence in mitigation he might have. He does not dispute that there was proper consideration of his pre-sentence investigation report. There is no allegation that the trial court relied upon any confidential information unknown to defendant, which was the fault in Gardner. Since the trial court here did not engage in any sort of redetermination or reweighing, but instead simply reported facts which it had not fully reported earlier, due process requirements were not violated.

Therefore, the Indiana Supreme Court's order of remand for a nunc pro tunc entry of reviewable factual findings is not in conflict with applicable decisions of this Court.

### III.

#### INDIANA'S PROCEDURE FOR REVIEW OF SENTENCE IS NOT IMPROPER

Petitioner maintains that the Indiana Supreme Court's holding that its procedure to review death sentences is adequate and insures that the death penalty will not be inflicted in an arbitrary and capricious manner conflicts with this Court's holdings.

Under the applicable Indiana statutes and case law a trial court which issues a judgment of death must also make findings of fact that demonstrate the existence of the statutory aggravating factor beyond a reasonable doubt, and the factual basis supporting the trial court's determination. Indiana Code 35-4.1-4.3; Spinks v. State, (1982) \_\_\_ Ind. \_\_\_, 437 N.E.2d 963.

Any death penalty must be reviewed. Such review includes consideration of the entire record, including the trial transcript, pre-sentence report, and transcript of the sentencing hearing. Judy v. State, (1981) \_\_\_ Ind. \_\_\_, 416 N.E.2d 95. Petitioner asserts that the Indiana Supreme Court narrowly applies the standards listed in the Indiana Rules for the Appellate Review of Sentences, Rule 2, and so will not interfere with a sentence unless it is so "manifestly unreasonable in light of the nature of the offense and the character of the offender" that no reasonable man could agree with it. Recourse to the Indiana Supreme Court's holdings in cases where it has discussed the Rules or reviewed death penalties shows that in capital cases it has not interpreted its Sentence Review Rules so narrowly.

In 1976, this Court decided the cases of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d

913 (1976) and their companion cases. Indiana's capital punishment statute, Indiana Code 35-50-2-9, follows the Florida procedure accepted by this Court in Proffitt, supra. Indiana's scheme kept all the important procedural characteristics of the Florida statute: The trial is bifurcated into guilt and penalty phases; the jury's recommendation regarding sentencing is advisory to the judge, not final or binding; the trial judge is the final sentencing authority; and there is a mandatory review of the sentence by the state supreme court. In addition, the Indiana statute sets a higher standard by requiring the jury, in order to recommend, and the judge, in order to sentence to death, to find the existence of at least one of the specified statutory aggravating circumstances beyond a reasonable doubt. Ind. Code 35-50-2-9. The statute requires the jury and the judge to consider any circumstances in mitigation of the sentence.

In the first case to arise under the new statute, Judy v. State, (1981) \_\_\_ Ind. \_\_\_, 416 N.E.2d 95, the Indiana Supreme Court cited Indiana Rules for the Appellate Review of Sentences, but then went on to state its particular aims in reviewing death penalties (Id., at 108): "... to safeguard against the influence of improper or prejudicial factors at the trial level, and to ...determine that the elements of arbitrariness and capriciousness ... were not present in the sentencing decision." With those considerations in mind, the Judy court said it would "meaningfully and systematically review" each capital punishment case "in light of other death penalty cases." Such a mandatory review of a trial court's articulated reasons for imposing the death penalty assures "consistency, fairness and rationality in the evenhanded operation" of the death penalty statute, the Court said. The issue, said the Court, is "the appropriateness of capital punishment in a given case." The court did not state that the issue was whether or not the



punishment was "manifestly unreasonable" or whether the test of that unreasonableness was whether "any reasonable man" would disagree with it. In application the Supreme Court determined in Judy "that the sentence of death ... was not arbitrarily or capriciously arrived at, and, without any doubt, [was] reasonable and appropriate." Judy, supra, 416 N.E.2d at 111.

In Brewer v. State, (1981) \_\_\_ Ind. \_\_\_, 417 N.E.2d 889, cert. denied \_\_\_ U.S. \_\_\_, 102 S.Ct. 3510, 73 L.Ed.2d 1384, the Indiana Supreme Court noted that even though the death penalty statute does not specifically require it, the court would require that the trial judge specifically state the factors relied upon in reaching his decision. The Indiana Court went on to note that its review would heed the guidelines established by this Court in Gregg, Proffitt, and Woodson, supra. It said that "the function of appellate review in the overall consideration of constitutionality [of a death sentence] is to assure that the system, as applied in a particular case, precludes the capricious and arbitrary infliction of the penalty." 417 N.E.2d at 900.

The Indiana Supreme Court then went on to discuss the meaning of the sentence review rule's standard of "manifest unreasonableness of sentence" as applied in capital cases. It said that since "capriciousness or arbitrariness in the infliction of the death penalty cannot be other than cruel and unusual", Indiana's formulation of "manifest unreasonableness" of sentences required, in death cases, a review on the same standards announced by the Supreme Court of the United States. 417 N.E.2d at 900. In the Brewer case the Indiana court went on to state, again, that the court's concern on review is the "appropriateness, under the statute, of capital punishment in a given case" and the assurance of "consistency, fairness and rationality in the operation of the death penalty statute." 417 N.E.2d at 901.

In Williams v. State, (1982) \_\_\_ Ind. \_\_\_, 430 N.E.2d 759, cert. denied \_\_\_ U.S. \_\_\_, 103 S.Ct. 479, \_\_\_ L.Ed.2d \_\_\_, the Court, after citing the Sentence Review Rules, again said that at least as applied in capital cases, the rules placed emphasis on each individual defendant and required "thorough consideration of facts presented by the entire record." 430 N.E.2d 765.

In the instant case, Schiro v. State, (1983) \_\_\_ Ind. \_\_\_, 451 N.E.2d 1047, the Indiana Supreme Court repeated the applicability of its standards for review stated in Judy, supra: That such cases are reviewed "in light of other death penalty cases"; and that the Court would make an "informed, focused, guided, and objective inquiry" into "the appropriateness of the capital punishment in a given case." Schiro, 451 N.E.2d at 1052-1053. Thus, it is clear that in practice the Indiana Supreme Court will review capital cases in conformity to the standards announced by this Court.

In this case, the Indiana Supreme Court, after discussing its standard of review, explicitly stated that it would "examine whether the sentence of death is appropriate." 451 N.E.2d 1058.

Its consideration of the facts included Petitioner's conscious and pre-planned decision to gain admittance to the victim's house with the purpose of raping her and then murdering her so that he could perform his necrophiliac "ritual". The Indiana Court considered the multiple rapes and vicious assaults which preceded the death by strangulation, and the sadistic and sexual assaults of the corpse. The facts in the case also included the lack of mitigating circumstances: Petitioner's numerous prior criminal acts including rapes and criminal deviate conduct ("criminal deviate conduct" is the term used in Indiana law for non-consensual sexual contact other than penile-vaginal intercourse Ind. Code 35-4-4-2), sadistic assaults on a two

year-old child and rape of a mother in the presence of her child; lack of remorse, and an absence of any impairment of his ability to appreciate the wrongfulness of his conduct or conform his conduct to the law. The Indiana Supreme Court thus in practice reviewed this case in such a manner as to given individualized attention to the facts and circumstances of the case and the character of the accused. The Court's ultimate decision was "that the death penalty was not arbitrarily or capriciously applied, and is reasonable and appropriate." 451 N.E.2d 1058-1059.

Therefore, the State of Indiana would submit that its supreme court in applying the applicable statutes, rules, and case law does, as it says it does, affirm death penalties only when appropriate in light of the nature of the offender and the offense.

The other aspect of Indiana's procedure to be discussed is whether it assures that the death penalty will not be imposed when disproportionate in light of the facts in other capital and non-capital murder cases. Petitioner maintains that our procedure is marked by a "total absence of any type of proportionality review."

Pursuant to Gregg, supra; Proffitt, supra; Zant v. Stephens, \_\_\_ U.S. \_\_\_, 103 S.Ct. 2633, \_\_\_ L.Ed.2d \_\_\_ (1983) and Barclay v. Florida, \_\_\_ U.S. \_\_\_, 10 S.Ct. 3418, \_\_\_ L.Ed.2d \_\_\_ (1983) our court is required to establish a review procedure which assures that the application of the death penalty is consistent in similar cases.

Proffitt v. Florida, supra upheld Florida's procedure because its Supreme Court had indicated judicially that it considered its function to be to see that reasons present in one case will reach a result similar to that reached in another case under similar circumstances, State v. Dixon, 283 So.2d 1 (Fla., 1973), and found that the death cases were "consistently

reviewed by a court which because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the even-handed operation of the state law", thus assuring that death will not be "wantonly" or "freakishly" imposed. Proffitt, 96 S.Ct. at 2966, 2970. Zant v. Stephens, supra, does not alter the standards announced in Gregg and Proffitt, but simply notes again with approval Georgia's procedure.

In the Stephens, case, supra, this Court used for discussion the Georgia Supreme Court's analogy of a procedural "pyramid" in homicides. Indiana's "pyramid" would "filter out" cases as they flow from the base to the apex: First, homicides that are lesser than murder. Second, murder cases where no statutorily defined aggravating circumstance is found to exist. Third, murder cases with aggravating circumstances which are sufficiently offset by mitigating circumstances to outweigh the aggravation. Finally, in all cases reaching the fourth plane in the "pyramid", the State's highest court reviews the sentence again in light not only of individual facts of the offense and the offender, but, as a state high court is uniquely situated to do, in proportion to others in similar cases. Indiana's "pyramid" is much narrower at the lower levels than either Florida's or Georgia's. Whereas our two sister states include subjective aggravating circumstances such as the outrageousness or depravity of the offense (Sec. 272534,1(b) of the Georgia Code); our statute's aggravating circumstances are limited to narrowly drawn, objective factual elements. Indiana Code 35-50-2-9. The objectivity of Indiana's permissible list of aggravating circumstances limits possibility of capricious or disproportionate punishment at an earlier level than Florida or Georgia.

The Indiana Supreme Court has, in this case and others, explicitly held that it can and will "meaningfully and systematically review each case in which capital punishment has been



chosen, in light of other death penalty cases, and so ensure consistent, fair, and evenhanded operation of the statute." Judy, supra, 416 N.E.2d 95 at 108 (emphasis added). In this case the Indiana Supreme Court stated that "because of state-wide jurisdiction over most criminal cases, and always over cases involving the death penalty or life imprisonment we are confident that through continuous and exclusive review of such cases, no sentence of death will be freakishly or capriciously applied in Indiana." Id. at 1052.

In Barclay v. State, (1983) \_\_\_ U.S. \_\_\_, 103 S.Ct. 3418, \_\_\_ L.Ed.2d \_\_\_, this Court did not enlarge the requirements it previously stated as regards review for disproportionality of punishment, but simply observed that its decision was buttressed by Florida's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether "the punishment is too great." 103 S.Ct. at 3428.

In Barclay, this Court stated that:

It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, see Proffitt v. Florida [full citation omitted] and as long as the decision is not so wholly arbitrary as to offend the constitution the Eighth Amendment cannot and should not do more.

103 S.Ct. at 3424.

Petitioner contends that of 18 reasonable persons who have considered the issue of his punishment (the jury, the judge, and the Indiana Supreme Court), fourteen (i.e., the jury and two state Supreme Court justices) have concluded that the petitioner should not have received the death penalty.

This argument (besides ignoring the actual roles played by each of these bodies) overlooks the fact that Petitioner appeared to have deliberately set out to feign bizarre behavior

on his part whenever the jury was present. Psychiatric evidence indicated that his behavior in the past had been to evade responsibility for his actions by acting mentally ill. The trial court noted in its finding that this behavior occurred only when the jury was present and concluded that this ploy for sympathy had unduly influenced the jury. Thus, 12 members of Petitioner's "majority" were considered by the trial judge's findings to have been prejudiced, a fact which justified the trial court in reaching a different conclusion from the jury.

Neither of the other two members of the "majority", i.e., the dissenting Indiana Supreme Court Justices, dissented on the basis that the sentence was freakishly applied, arbitrary or capricious, or disproportionate. (Justice Prentice, in fact, in his dissent characterized Petitioner as "a paragon of revulsion." 451 N.E.2d at 1070) Thus, we do not believe that any of the Petitioner's "fourteen people" can be said to have reasonably concluded, based on the facts and circumstances, that the Petitioner's crime and character did not justify the death penalty.

In placing proportionality in issue, Petitioner lists all reported Indiana capital cases in which juries have rejected death requests by the State. The trial court judges in those cases did not differ from that recommendation. In fact, the instant case is the only time a judge has differed with a jury recommendation for mercy. He asks rhetorically what distinguished his case from two of these.

In the first case, Miller v. State, (1983) \_\_\_ Ind. \_\_\_, 448 N.E.2d 293 defendant was convicted of felony/murder in a case where a two-year old child died of blows to the abdomen and head. The underlying criminal deviate conduct conviction was based on bruises resulting from biting on the child's buttocks, which constituted evidence to support "touching . . . with intent to gratify sexual desires", an element of the underlying felony. To aggravate this offense to capital status, the

State would have had to prove that the felony/murder was a "knowing and intentional" felony/murder. Ind. Code 35-50-2-9. Repellant as the Miller case was, there was no direct evidence of actual intent to kill. Here of course, Schiro admitted his forming a plan to "destroy" his victim when she once attempted to leave.

In the other case, Dunaway v. State, (1982) \_\_\_ Ind. \_\_\_, 440 N.E.2d 682 defendant, during an argument with a woman with whom he had just had sex, killed her with a knife. The State alleged as an aggravating circumstance knowing and intentional murder in the commission of criminal deviate conduct. But there was no evidence that the sexual acts which preceded were non-consensual. The killing, although premeditated, occurred in hot blood. The Indiana Court decision in Dunaway strongly suggests that if a death sentence had been imposed, the Court might have set it aside due to lack of evidence of criminal (i.e., non-consensual) deviate conduct.

In contrast, the killing in this case was admittedly coldly premeditated. There is ample evidence that the sexual acts were forceful rapes. Thus, in comparison with Miller and Dunaway, the instant case appears much more brutal, callous, premeditated, and depraved. The Petitioner here is entirely without remorse, whereas in Miller the defendant himself called for physicians to try to save the little girl, and Dunaway appears to have expressed remorse. Our procedure in practice made a rational distinction between the defendant in the instant case and those in the cited cases.

Petitioner's final point on this issue is whether the Indiana Supreme Court applied an incorrect standard of review in considering a judge's disagreement with a jury's recommendation of mercy.



In 1976 this court in Proffitt cited as a safeguard in Florida's procedure that the Florida Supreme Court used a standard that a sentence of death following a jury recommendation of life with be upheld only on facts so "clear and convincing that no reasonable person could differ." supra, at 249, 96 S.Ct. at 2960, 59 L.Ed2d at 921. This standard was originally applied by the Florida Supreme Court in Tedder v. State, (Fla., 1975) 322 So.2d 908. In Tedder, Florida moved for the death penalty under the Statutory aggravating circumstance that the killing was especially "heinous, atrocious, or cruel" ( a subjective standard which Indiana does not allow as an aggravating circumstances). The basis for the Florida Supreme Court's reversing the judge's overruling the jury's mercy decision was that the defendant's allowing one of his victims, after being shot, to languish without assistance, although cruel, was not what the legislature intended when it required that the killing be "especially" heinous.

This Court cited the Tedder standard more recently in Barclay v. Florida, \_\_\_ U.S. \_\_\_, 103 S.Ct. 3418, L.Ed.2d \_\_\_. That was the killing of a man selected at random and torture/ murdered with the objective of initiating a racial war. Since codefendant had been sentenced to death, the Florida Supreme Court held that the trial judge was correct in concluding that it was unreasonable for the jury to be lenient. Barclay v. State, (Fla. 1977), 343 S.2d 1266.

However, neither Proffitt nor Barclay held that the Tedder standard was required by this Court. In fact, in Proffitt this Court explicitly held that a judge's sentencing "should lead, if anything, to even greater consistency in the imposition at trial level of capital punishment, since a trial judge is more experienced at sentencing than a jury, and therefore, is better able to impose sentences similar to those imposed in analogous cases." 428 U.S. at 252, 96 S.Ct. at 2966. Proffitt



also notes, approvingly, that the judge may be in possession of more facts relevant to sentencing than the jury.

In the Indiana Supreme Court's consideration of Petitioner's invitation to apply the Tedder standard in such cases, the Court stated that:

While we agree that a jury plays a very important and necessary role in our judicial system, we are loath to institute a higher degree of scrutiny in situations where the trial court and jury disagree about the imposition of the death penalty. Trial courts are presumed to know and to understand the law. We have as great a confidence in the trial court's function in our judicial system as we do in the function of the jury.

. . . [T]he trial court, with more experience in the criminal system, has better knowledge with which to compare the facts of this case with that of other criminal activity. This should result in greater sentencing consistency.

Although this Court has held the Tedder standard is helpful in situations where a jury has reached its recommendation of mercy on weighing an allegation that the killing was "especially heinous, atrocious, or cruel", it has not held it to be necessary where the aggravating circumstance is on objective factual issues and there is sufficient other indication that the death sentence is not imposed capriciously, arbitrarily, or freakishly.

However, we believe that if Florida applied the Tedder standard to the facts in this case, it would conclude that jury leniency could not be agreed with by a reasonable man in possession of all the facts, including the sham "mental illness". Our basis for this conclusion is a review of about two dozen Florida cases, especially McRae v. State, (Fla. 1981) 395 So.2d 1145.

The facts in McRae are strikingly similar to the facts in this case. The jury recommended a life sentence. The Florida Supreme Court concluded that an attempt to convince the jury of the existence of the mitigating circumstance of "under the influence of extreme mental or emotional disturbance at the time the crimes were committed" must have been successful. "There is

no other explanation for their advisory verdict in view of the heinous nature of the killing," the Florida Court found. "We find their recommendation has no reasonable basis under the circumstances of this cause."

McRae suggests that even under Florida's Tedder standard it would be unreasonable to hold that there was anything in Petitioner's character or the character of the offense to mitigate this offense. The State of Indiana disagrees that it is necessary that no reasonable person could agree with a jury recommendation before a judge may overrule it. We think that it is sufficient if the judge's determination can be held to be reasonable and not disproportionate. The trial court judge was aware of the Petitioner's bizarre behavior whenever the jury was present. He could properly conclude from this that the jury was tricked into its unreasonable recommendation. The trial judge also knew that Petitioner frequently feigned mental illness in the past. The judge explicitly cited this consideration in his sentencing findings.

The State of Indiana believes that in light of these facts our Supreme Court was not in conflict with applicable decision of this Court when it held that Petitioner's sentence was given the requisite review on proper standards.

#### CONCLUSION

WHEREFORE, Respondent respectfully submits that the issues alleged by Petitioner have been correctly disposed of in conformity with the opinions of this Court and that the Petitioner for a Writ of Certiorari should be denied.

Respectfully submitted,  
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